IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 1998
No. 1089

STEVE NAM f/k/a SANG SU NAM, *et al*.,

Appellants

v.

MONTGOMERY GENERAL HOSPITAL, *et al*.,

Appellees

On Appeal from the Circuit Court for Montgomery County, Maryland
(Ann S. Harrington, Judge)

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

On August 12, 1994, Steve and Sunny Nam filed a Statement in Support of Claim in the Health Claims Arbitration Office (HCAO). The Nams filed the claim on behalf of themselves and as personal representative of the estate of Elizabeth Nam, their daughter. (E. 23, 116) The Statement named Montgomery County, Maryland, Montgomery General Hospital, Inc., (Hospital) and Emergency Medicine Associates, P.A., (EMA) as defendants and alleged liability against the County based on the negligent acts of a County employee through the doctrine of *respondeat superior*. The Nams filed a First Amended Statement on December 16, 1994, in which they added John Doe, M.D., as an individual defendant and alleged that John Doe, M.D., was the County employee who negligently treated Sunny Nam on December 23, 1991. (E. 117, 153-166)

After conducting some discovery, the parties filed a joint election to waive arbitration and proceeded to Circuit Court. (E. 23-25) Once there, the Nams filed a Complaint that included the County, the Hospital, EMA and John Doe, M.D., in the caption. The Complaint did not seek relief from John Doe, M.D., invidividually, and the Nams filed a Line dismissing John Doe, M.D., from the case with prejudice. (E.9-22, 29)

The County filed a motion to dismiss in the Circuit Court based on governmental immunity. Before the Court decided the motion, the Nams filed a Second Amended Statement in the HCAO under the original case number, naming only Lizzie James, R.N., as a defendant. None of the other original health-care providers were named, nor was relief sought from them. (E. 38-50, 63-73) At the same time, the Nams filed a motion to

stay the Circuit Court proceeding pending the HCAO's handling of the amended claim. (E. 59-62) James filed a motion to dismiss the HCAO claim, and her motion was granted at least partly because the statute of limitations had expired. (E. 81) This second matter then proceeded to Circuit Court, where it was consolidated with the previous case. (E.76)

In response to the new case, the County and James filed a motion to dismiss and/or for summary judgment, asserting governmental immunity and lack of jurisdiction, respectively. (E. 223-290) The Nams opposed the motion and, after a hearing, the Circuit Court granted the motions and dismissed both cases with prejudice. (E. 192, 195-222) The Nams noted an appeal to this Court. (E. 193-194)

QUESTIONS PRESENTED

I. Did the Circuit Court Correctly Hold that Montgomery County Enjoys Governmental Immunity from Claims of Negligence While Performing the Governmental Function of Providing Health Care?

II. Did the Circuit Court Correctly Decide that the Health Claims Panel Chair Did Not Have Jurisdiction to Handle the Second Amended Statement in Support of Claim?

III. Did Any Theory Permitting Amendment of Pleadings Enable the Nams to Include James in Either the HCAO Claim or the Circuit Court Proceeding?

STATUTES, ORDINANCES AND CONSTITUTIONAL PROVISIONS

The full text of all relevant statutes, ordinances and constitutional provisions appears in the appendix to Appellee's brief.

STATEMENT OF FACTS

Montgomery County provides medical and obstetrical care to the general public through the Montgomery County Department of Health. (E. 47) The claims in this case arise from that service. Ms. Nam sought and received pregnancy-management care between June and December 1991. Lizzie James, R.N., an employee of the Health Department at the Germantown clinic, examined Ms. Nam on December 23. The Nams alleged that the Health Department's negligence on that date, by and through the acts of its employee, John Doe, M.D., ultimately harmed Ms. Nam and her daughter. (E. 15-22)

The Nams initially filed a Statement with the HCAO naming Montgomery County, the Hospital and EMA as defendants. In their First Amended Statement, the Nams added John Doe, M.D., as a defendant and described this person as the negligent medical practitioner who treated Ms. Nam. The Nams then conducted discovery and, in answers to interrogatories, the County identified Lizzie L. James, R.N., as one of its employees who had examined Ms. Nam. The Nams deposed James on August 22, 1995, during which James identified herself as the County employee who examined and treated Sunny Nam on December 23, 1991—the date on which the negligent acts or omissions allegedly occurred. (E. 230) Despite this knowledge, the Nams did not amend their Statement before the HCAO a second time to substitute James for John Doe, M.D., nor did they serve James with a summons or the First Amended Statement.

Instead, on or about October 23, 1995, all parties filed a joint election to waive arbitration. (E. 254-256) Based upon this filing, the Panel Chair issued an order acknowledging that "all parties" joined in the waiver of arbitration, and he transferred the case to the Circuit Court for Montgomery County, Maryland. (E. 257) Although John Doe, M.D., remained mentioned in the amended Statement, the Nams did not attempt to serve James or anyone else as the putative John Doe. Moreover, the Nams did not take exception to the Panel Chair's Order, nor did they dispute that "all parties" agreed to waive arbitration.

Thereafter, the Nams filed a complaint in the Circuit Court that identified Montgomery County, the Hospital, EMA and John Doe, M.D., as defendants in the caption. The Complaint sought money damages from the County, the Hospital and EMA—not John Doe, M.D. (E. 9-22) Before any of the defendants filed an answer, the Nams voluntarily filed a Line dismissing John Doe, M.D., with prejudice. (E. 29) Because James was known to be John Doe, M.D., the Line dismissed the Nams' claims against James.

With claims against only the County remaining, the County filed a Motion to Dismiss based on governmental immunity. (E. 38-50) While the motion was pending, the Nams filed a Second Amended Statement using the original case number in the HCAO. The Second Amended Statement named James as the only defendant and did not seek relief from the County, the Hospital, EMA, or any other health-care provider. (E.

63-73) Inasmuch as the second amendment was filed more than four years after Sunny Nam's December 23 visit, during which she alleged her injuries occurred, James filed a preliminary motion to dismiss in the HCAO asserting that the statute of limitations barred the claim. Alternatively, she argued that the HCAO no longer had jurisdiction over the case. The Panel Chair held a hearing on the motion and requested supplemental memoranda of law. At a subsequent hearing, the Panel Chair granted James' motion and dismissed the Second Amended Statement as untimely. (E. 276-278) The Nams filed a Complaint and Action of Rejection in the Circuit Court, and James filed a Cross-Action of Rejection. (E. 80-96) The new case was consolidated with the previous case. (E. 76)

The County and James filed a second motion to dismiss and/or for summary judgment. The County reasserted governmental immunity and James reasserted all of the defenses she raised before the HCAO, including lack of jurisdiction before the statute of limitations expired. (E. 223-290) The Circuit Court granted the defendants' motion and this appeal ensued. (E. 192-193)

ARGUMENTS

I. MONTGOMERY COUNTY ENJOYS GOVERNMENTAL IMMUNITY FROM CLAIMS OF NEGLIGENCE WHEN IT PERFORMS A GOVERNMENTAL FUNCTION.

Montgomery County, Maryland, is a charter county created pursuant to Article XI-A of the Maryland Constitution. The General Assembly has delineated the powers that a charter county may exercise in the Express Powers Act, which includes the authority to

create a health department and to exercise various health-related powers. *See* Md. Ann. Code art. 25A, §§ 5(C), 5(J), 5(S), and 5(Y) (1998 Repl. Vol.).

Pursuant to this legislative authority, the County created the Montgomery County Health Department as an agency within the executive branch of government. Montg. Co. Code § 1A-201 (1994, as amended). Among the various functions delegated to this agency is the duty to develop and to administer community health services, including medical care. Montg. Co. Code § 2-42A. Although fees may be charged for the services, they must not exceed the cost of the services provided. The health-care program, therefore, is sanctioned by legislative authority, operates for the sole benefit of the public, and derives no profit for the County.

The existence of governmental immunity from tort actions depends upon whether the government performs a "governmental" or "proprietary" function. In general, a county does not have immunity when it handles "proprietary" matters, but enjoys immunity when it handles "governmental" matters. *Tadjer v. Montgomery County*, 300 Md. 539, 546-550, 479 A.2d 1321, 1324-1326 (1984). The Court of Appeals has acknowledged the difficulty in distinguishing between the two types of functions, but has explained that the focus is upon "whether the act performed is for the common good of all or for the special benefit or profit of the corporate entity." *Id*. at 547, 479 A.2d at 1325 (citations omitted). An act will be governmental if it "is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument inuring to the

municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest . . . ." *Id*. at 546, 479 A.2d at 1324-1325 (quoting *Baltimore v. State*, 173 Md. 267, 275-76, 195 A. 571, 576 (1937)).

Based on these criteria, the issuance of a building permit,[1] maintenance of a courthouse,[2] and operation of a landfill[3] have been considered to be governmental functions for which governmental immunity applies. This Court even recognized that a health department, established and supported as an agency of a local government, performs governmental functions. In *Rivera v. Prince George's County Health Department*, 102 Md. App. 456, 649 A.2d 1212 (1994), *cert. denied*, 338 Md. 117, 656 A.2d 772 (1995), Keisha Rivera, who was pregnant, sought medical treatment at one of the clinics operated by the Prince George's County Health Department. Rivera complained of ruptured membranes and pains occurring at evenly spaced intervals. Roberto Casas, M.D., examined Rivera and instructed her to go home. Later, Rivera was admitted to the hospital with evidence of fetal distress, and her child subsequently was diagnosed as suffering from severe mental retardation caused by hypoxia, a condition that occurs when the fetus is deprived of oxygen. Rivera filed a medical malpractice claim against the health-care provider and the Prince George's County Health Department.

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[1]*Spriggs v. Levitt & Sons, Inc.*, 267 Md. 679, 685-86, 298 A.2d 442, 445 (1973).

[2]*Heffner v. Montgomery County*, 76 Md. App. 328, 335, 545 A.2d 67, 70 (1988).

[3]*Tadjer, supra*.

One of Rivera's arguments suggested that the Health Department provided charitable services and, therefore, it could not assert immunity from her claim.[4] In addressing this assertion, this Court rejected the characterization of the county agency as charitable. Instead, this Court explained that the Health Department was "a public governmental agency and, in performing its function as such, [was] providing *governmental* . . . services." *Id*. at 465, 649 A.2d at 1216 (emphasis in original). As a result, absent a waiver of immunity, the Prince George's County Health Department retained its immunity from liability. *Id*.

Like the Health Department in *Rivera*, the Montgomery County Health Department in the present case provided medical care to a pregnant woman. When it did so, the Health Department acted as a public governmental agency performing a governmental function. The Health Department performed duties prescribed by statute and derived no income or profit by virtue of the medical care it provided. Montg. Co. Code § 2-42A. Montgomery County enjoys governmental immunity from liability for the alleged acts of negligence in this case, because it performed only governmental functions and no proprietary functions.

The Nams try to overcome the hurdle of governmental immunity by arguing that the Local Government Tort Claims Act (LGTCA) waives immunity. The LGTCA,

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[4]Rivera based this argument on Md. Ann. Code art. 48A, § 480 (1994 Repl. Vol.), which required the liability insurance policy for a charitable institution to include a provision that the insurer would be estopped from asserting charitable immunity as a defense. *Rivera*, 102 Md. App. at 464 n.4, 649 A.2d at 1216 n.4.

however, does not waive governmental immunity, nor does it waive any immunities that an officer or employee of the government may have held prior to its enactment. Instead, the LGTCA requires a local government to indemnify and defend its officers and employees in those cases where they do not have immunity. Under the facts in this case, the LGTCA does not apply to the claim against the County, because governmental immunity protects the County in a direct suit against it. The LGTCA, however, would cover a claim against James, unless she were a public official. *See Khawaja v. City of Rockville,* 89 Md. App. 314, 598 A.2d 489 (1991), *cert. granted*, 325 Md. 551, 601 A.2d 1114, *dismissed*, 326 Md. 501, 606 A.2d 224 (1992), and Md. Code Ann., Cts. & Jud. Proc. § 5-304(b) (1998 Repl. Vol.). Nothing in the LGTCA relieves a claimant from serving a defendant-employee with a summons and complaint—it simply places the financial responsibility for any judgment against the employee on the local government. *Williams v. Montgomery County*, 123 Md. App. 119, 126, 716 A.2d 1100, 1103 (1998), *cert. granted* December 10, 1998 (citing *Khawaja v. City of Rockville*, 89 Md. App. 314, 325-326, 598 A.2d 489 (1991); other citations omitted).

The LGTCA does not contemplate that a plaintiff can avoid its effect by instituting an action against the local government based upon the doctrine of *respondeat superior,* rather than by bringing an action under the LGTCA against the employee. The goal of the statute would fail if it were interpreted this way. Simply, the LGTCA intends to protect a governmental employee who is sued by providing the employee with

indemnification and a defense. The LGTCA cannot be read to deprive a local government of its common law immunities in the face of the specific language to the contrary. In fact, a seminal case addressed the interplay between governmental immunity and the immunity of a local government's officers and employees, and the Court of Appeals noted that the doctrine of *respondeat superior* could not be used to pierce the governmental immunity of a local board of education. *Duncan v. Koustenis,* 260 Md. 98, 271 A.2d 547 (1970). The Court reached this conclusion while denying immunity to a school teacher and holding the teacher's employer — the local board — immune.

In the present case, the County enjoys immunity for the exercise of its governmental function in providing medical care. The Nams did not sue an employee or actor of the County but, in fact, dismissed the only individual defendant when they dismissed John Doe, M.D. Although the LGTCA requires the County to satisfy a judgment entered against its employee and to provide a legal defense for the employee when the employee is sued, the Act does not preclude the defense of governmental immunity. The Circuit Court, therefore, correctly dismissed the claims asserted against Montgomery County, and this Court should affirm that decision.

II. THE HEALTH CLAIMS PANEL CHAIR DID NOT HAVE JURISDICTION TO HANDLE THE SECOND AMENDED STATEMENT IN SUPPORT OF CLAIM.

The Health Claims Arbitration Act establishes an administrative prerequisite to initiation of a lawsuit in Circuit Court alleging medical malpractice. *Giocochea v. Langworthy*, 345 Md. 719, 694 A.2d 474, *cert. denied*, 118 S.Ct. 321 (1997). A claimant must submit a medical malpractice claim to the HCAO for non-binding arbitration prior to filing a complaint in the Circuit Court. Md. Code Ann., Cts. & Jud. Proc. § 3-2A-02 (1998 Repl. Vol.); *see also Johns Hopkins Hospital v. Lehninger*, 48 Md. App. 549, 556, 429 A.2d 538, 542 (1981) (citation omitted). In this way, the Act provides a mechanism that screens these claims and tries to eliminate those without merit. In turn, the reduction of claims is intended to lower the cost of malpractice insurance and the overall cost of health care. *Adler v. Hyman*, 334 Md. 568, 575, 640 A.2d 1100, 1103 (1994) (citing *Group Health Ass'n. v. Blumenthal*, 295 Md. 104, 113, 453 A.2d 1198, 1204 (1983)).

Although the matter must begin in the HCAO, the parties may elect to waive arbitration. Md. Code Ann., Cts. & Jud. Proc. § 3-2A-06A (1998 Repl. Vol.). When this occurs, the Panel Chair notes the mutual agreement and transfers the matter to the Circuit Court or the United States District Court, where the claimant must file a complaint within 60 days. *Id*. In the present case, this is precisely what occurred—all parties before the HCAO elected to waive arbitration, and the Nams filed a Complaint in the Circuit Court.

(E. 9-25) These actions divested the HCAO of jurisdiction[5] over the claim and, absent any service of process on James, she did not have to join in the election of waiver. Inasmuch as James was not a party prior to the transfer of the case to Circuit Court, she could not be added by amendment once the case left the HCAO. As discussed in the following sections, this made dismissal of the claims asserted against James proper.

The Joint Election to Waive Arbitration and the Subsequent Transfer of the Case to the Circuit Court Divested the Arbitrator of Jurisdiction.

Under the Act, at any time before the HCAO hears a claim, the parties may agree to waive arbitration and proceed to the Circuit Court. Md. Code Ann., Cts. & Jud. Proc. § 3-2A-06A. When the parties do so, the HCAO transfers the matter to the court and becomes divested of jurisdiction over the claim. To file an additional claim or to include a new party, one would have to file a new claim with the HCAO, which would receive a new case number. Any new claim, of course, would have to comply with the applicable statute of limitations.

In the present case, the Nams initially filed a Statement in Support of Claim with the HCAO, naming Montgomery County, the Hospital, and EMA as defendant health-care providers. The claim was assigned Case No. 94-382. Later, the Nams amended

[5]In *Weidig v. Crites*, 323 Md. 408, 593 A.2d 1094 (1991), the Court of Appeals stated that the term "jurisdiction" does not apply to these matters, and that the more accurate description focused upon whether the HCAO has the power or authority to act. For brevity, however, the County has opted to use the shorter term instead of the more lengthy description.

their Statement to add John Doe, M.D., the County employee whom the Nams claimed acted negligently. (E. 52) During discovery, the County identified James in its answers to interrogatories, and the Nams took James's deposition. (E. 230) Despite James's identification of herself as the County employee who examined and treated Ms. Nam on December 23, 1991—the date that John Doe, M.D., allegedly was negligent—the Nams did not amend the Statement to substitute James, nor did they serve her with a summons or a copy of the Statement, while the claim remained before the HCAO. Instead, the Nams joined the other existing parties— Montgomery County, the Hospital, and EMA—and filed a Joint Election to Waive Arbitration. (E. 23-25) The HCAO Panel Chair found that all parties agreed to waive arbitration and, therefore, he ordered that the claim be transferred to the Circuit Court for Montgomery County, Maryland. (E. 257) Once the order was issued and a complaint filed in the Circuit Court, the HCAO became divested of jurisdiction over the entire claim in HCAO Case No. 94-382.

After the County filed its motion to dismiss, the transfer of the case to the Circuit Court created a dilemma for the Nams. They could not file a new claim against James at the HCAO, because the statute of limitations had run. Yet, the HCAO had transferred the case to the Circuit Court based upon the joint election to waive arbitration. The only avenue remaining was to file the Second Amended Statement with the HCAO under the original case number. When James challenged the amendment by pointing out that no underlying Statement existed before the HCAO for the Second Amended Statement to

amend, the Nams argued for the first time that James had been a party prior to the transfer of the case. Because James had not joined the waiver of arbitration, the Nams contended, the waiver and transfer had no effect. (Apx.14)

The Nams rely upon *Marousek v. Sapra*, 87 Md. App. 205, 589 A.2d 529, *cert. denied*, 324 Md. 325, 597 A.2d 421 (1991), to support their argument that the HCAO retained authority to act on the Second Amended Statement. In *Marousek*, the claimant filed a motion to reconsider the dismissal of her claim and, before the panel chair ruled on the motion, the claimant gave notice of rejection of the award and pursued her rights in the Circuit Court. On appeal, this Court determined that the HCAO retained jurisdiction over the motion for reconsideration and likened the situation to taking a premature appeal.

This argument begs the question of whether James ever became a party to the claim before the HCAO. The Nams cite no authority for the proposition that the designation of a John Doe without effecting actual service on an individual makes anyone a party to a case. The Court of Appeals, however, addressed the issue in the context of determining who was a party for purposes of *res judicata*, explaining:

> [G]enerally, the parties to a suit are those persons who are entered as parties of record. But for the purpose of the application of the rule of res judicata, the term "parties" includes all persons who have a direct interest in the subject matter of the suit, and have a right to control the proceedings, make defense, examine the witnesses, and appeal if an appeal lies.

Ugast v. LaFontaine, 189 Md. 227, 232, 55 A.2d 705, 708 (1947) (citations omitted); *accord*, Maryland Law Encyclopedia, *Parties*, § 1 (1961). Using this definition, James was not a party before the HCAO and, therefore, the waiver of arbitration did not require her participation to have effect.

Only the Nams, the County, the Hospital and EMA were parties before the HCAO. Only the County, the Hospital and EMA filed answers to the original Statement and presented defenses. Hence, only the County, the Hospital and EMA had the right to control the proceedings. James did not file an answer, because she was not served with the summons or First Amended Statement. As such, she did not have an opportunity or an obligation to present a defense, and she had no right to control the proceedings before the HCAO. Moreover, after the Nams, the County, the Hospital and EMA mutually elected to waive arbitration, the Nams ratified the waiver by filing the joint election along with their Complaint in the Circuit Court in November 1995. (E. 9-25) The HCAO had no motions or decisions on the merits pending before it when this occurred, nor did it have any basis for viewing James as a party.

The absence of any matter before the HCAO and the passage of almost five months between the transfer of the case and the filing of the Second Amended Statement support a conclusion that the HCAO had been divested of authority to act on the Nams' claim and had no jurisdiction over the matter. No factual basis for concluding that the HCAO ever

had James before it as a party appears in the record of this case. As a result, the Second Amended Statement should have been dismissed based upon a lack of jurisdiction.

Judicial Estoppel Precluded the Filing of a Second Amended Statement in Support of Claim.

The attempt to revive their claim before the HCAO also should fail because the Nams have taken two inconsistent positions regarding the parties' election to waive arbitration. Initially, they agreed that all parties elected to waive arbitration, and the case was transferred to the Circuit Court. (E. 254-257) After they filed a Complaint and the County moved to dismiss their case, the Nams tried to return to the HCAO to pursue a claim against James. Because the statute of limitations had run, they had to try to pursue their claim under Case No. 94-382 and argue that the amendment related back. When challenged, the Nams argued that the waiver of arbitration had no effect because James had not joined in it. This change of position presents the type of situation in which judicial estoppel applies.

Judicial estoppel precludes a party from adopting inconsistent positions during the course of litigation. *WinMark Ltd. Partnership v. Miles & Stockbridge*, 345 Md. 614, 693 A.2d 824 (1997); *see also Wilson v. Stanbury*, 118 Md. App. 209, 702 A.2d 436 (1997). The underlying policy for the doctrine is to maintain fairness, because:

> If parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed; the coercive process of the law, available only between those who consented to its exercise, could be set naught by all. But the rights of men, honest and dishonest, are in the keeping of the courts, and the

> consistency of proceeding is required of all those who come or are brought before them. It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation, must act consistently with it; one cannot play fast and loose.

Kramer v. Globe Brewing Co., 175 Md. 461, 469, 2 A.2d 634, 637 (1938) (citations omitted). In effect, the doctrine of judicial estoppel shares the same goal as the doctrine of clean hands. *WinMark*, 345 Md. at 628, 693 A.2d at 830-831. This means that the "[d]octrine is not applied for the protection of the parties nor as a punishment to the wrongdoer; rather, the doctrine is intended to protect the courts from having to endorse or reward inequitable conduct." *Adams v. Manown*, 328 Md. 463, 474-475, 615 A.2d 611, 616 (1992) (citing *Space Aero Products Co. v. R. E. Darling Co.*, 238 Md. 93, 120, 208 A.2d 74, 88, *cert. denied*, 382 U.S. 843 (1965)).

This Court has not hesitated to apply the doctrine of judicial estoppel when appropriate. For example, in *Billman v. State Deposit Ins. Fund Corp.*, 86 Md. App. 1, 585 A.2d 238, *cert. denied*, 323 Md. 1, 590 A.2d 158, *cert. denied*, 502 U.S. 909 (1991), the Maryland Deposit Insurance Fund Corporation (MDIFC) filed two lawsuits, and the individual defendants successfully opposed the consolidation of the two cases by arguing that each case involved separate and discrete transactions with no questions of fact or law in common. After the MDIFC obtained a jury verdict in the first case, the individual defendants asserted that the second case was barred under the doctrine of *res judicata*, because the claims in the second case could have been litigated in the first case. This

Court held that judicial estoppel precluded the individual defendants in *Billman* from raising the defense of *res judicata* because the basis for that argument was inconsistent with the their prior opposition to consolidating the two lawsuits.

In the present case, the statute under which the parties elected to waive arbitration clearly provides that "the parties may agree mutually to waive arbitration of a claim" and that, when they do so, "[t]he claimant shall file with the Director, a written election to waive arbitration which must be signed by all parties or their attorney of record in the arbitration proceeding...." Md. Code Ann., Cts. & Jud. Proc. § 3-2A-06A. Thus, before arbitration can be waived, *all* parties mutually must agree to waive the arbitration of the claim.

The Nams not only agreed that all parties elected to waive arbitration, but also, they acted in accordance with that election. First, they filed a Complaint in the Circuit Court and asked that court to issue summonses. (E. 258-272) Next, the Nams filed an Information Report and a Scheduling Conference Statement in the Circuit Court. (E. 285-290) Finally, through counsel of record, the Nams attended a Scheduling Conference and began to conduct discovery. (E. 3) During this entire time, the Nams made no attempt to reopen their claim in the HCAO, but acted as though all parties had waived arbitration. Only after the County filed its motion to dismiss did the Nams attempt to resuscitate the HCAO case and add a new party by filing a Second Amended Statement. Upon encountering opposition to the amendment, the Nams for the first time claimed that the

original election to waive arbitration was ineffective because all parties had not agreed to it. (E. 276; Apx. 14) Conceivably, if the County had not filed its motion to dismiss, the case would have continued to completion in the Circuit Court.

This change of position fits squarely within the parameters of judicial estoppel—by arguing that all parties agreed to waive arbitration and later contending that all parties did not consent, the Nams placed the HCAO in the position of rewarding inequitable behavior. Despite the Nams' knowledge of John Doe's identity, which they obtained through two discovery mechanisms before waiving arbitration and before leaving the HCAO, they chose not amend their Statement in Support of Claim to substitute James for John Doe, nor did they serve James with any of the documents in the HCAO proceeding. Inasmuch as James was not a party to the claim, she was not required to participate in the joint election to waive arbitration—nor could she have done so.

Judicial estoppel applies when necessary to prevent a party from playing fast and loose with the courts and to protect the integrity of the judicial process. *WinMark Ltd. Partnership, supra*. The Panel Chair erred by not applying judicial estoppel, and the practical result of his mistake was that the Nams were allowed to subvert the provisions of Md. Code Ann., Cts. & Jud. Proc. § 3-2A-06A by allowing the same case to accept a new filing after it was transferred to the Circuit Court. This placed the exact same allegations of negligence in two forums simultaneously. To permit this "about face" seriously impaired the integrity of both the arbitration system and the judicial process, and

also frustrated the intent of the Maryland Legislature. The matter properly should have been dismissed based upon judicial estoppel and the dismissal of the claims by the Circuit Court should be affirmed.

III. UNDER ANY THEORY PERMITTING AMENDMENT OF PLEADINGS, THE NAMS COULD NOT INCLUDE JAMES IN EITHER THE HCAO CLAIM OR THE CIRCUIT COURT PROCEEDING.

As discussed above, the transfer of the matter to the Circuit Court, followed by the County's motion to dismiss the case, presented a dilemma for the Nams—the statute of limitations had run as to James, and the HCAO had no case pending before it. The Nams presented several explanations for filing the Second Amended Statement in an attempt to circumvent the statute of limitations bar by finding a way to relate back to the original claim before the HCAO, including correction of a misnomer and imputing knowledge of an employer to an employee under a principal-agent theory. Although the Nams also contend that they filed the Second Amended Statement after they discovered that James was the "actual" health care provider who examined Ms. Nam on December 23, 1991, the record reveals that they had obtained this information well before they waived arbitration. Regardless of the theory proffered by the Nams, their attempt to include James in their case occurred too late and did not relate back to the original claim filed with the HCAO.

The Second Amended Statement Added a New Party

As mentioned above, the Nams tried to salvage their claim by arguing that James was a party when arbitration was waived, which made the transfer to Circuit Court

ineffective, because James did not join the waiver. In effect, the Nams contend that the inclusion of "John Doe" in the First Amended Statement permitted them to file the Second Amended Statement to substitute James for John Doe even after the case was transferred to the Circuit Court. They compare this substitution to the permitted correction of a misnomer. Because of the surrounding circumstances, however, the Second Amended Statement did not correct a party name—it added a completely new party.

Although the procedures for filing the claim with the HCAO do not address the issue of misjoinder of parties, the Maryland Rules provide guidance. Generally, "[a]n amendment may seek to . . . (5) correct misjoinder or nonjoinder of a party so long as one of the original plaintiffs and one of the original defendants remain as parties to the action . . . ." Md. Rule 2-341(c). The Second Amended Statement, however, only names James as a defendant. The absence of any of the original defendants as parties before the HCAO precluded correction of a misjoinder, but left the "amendment" untimely and subject to dismissal. *See Washington Homes, Inc. v. Interstate General Development, Inc.*, 29 Md. App. 244, 347 A.2d 899, *cert. denied*, 277 Md. 738 (1975).

Two additional principles support the conclusion that the Nams could not add James as a party through a Second Amended Statement. First, when an individual initiates suit against someone who is not a proper party defendant, the complaint cannot be amended to substitute another sole defendant without the risk of the court treating it

as a new cause of action. *Atkinson v. Philadelphia, Baltimore & Washington Railroad Co.*, 137 Md. 632, 113 A. 110 (1921). In accordance with this case, "John Doe, M.D." had not become a proper party defendant in the matter before the HCAO—no one was served or participated in the matter as John Doe, M.D. The absence of John Doe as a party precluded any substitution of another party in his place, especially when combined with the absence of any original defendant. Instead, the attempt to add James became a new cause of action.

Second, the appellate courts have distinguished between correction of a misnomer, which is permitted, and the attempt to add a new party by amendment. In *Western Union Telegraph Co. v. State ex rel. Nelson*, 82 Md. 293, 33 A. 763 (1896), the Court of Appeals permitted an amendment to correct the city affiliation for the telegraph company. The Court, however, admonished the parties that it would not have allowed the amendment to add a new defendant after the statute of limitations expired. Likewise, in *Grand-Pierre v. Montgomery County*, 97 Md. App. 170, 176, 627 A.2d 550, 553 (1993), this Court cautioned that, when an amendment seeks to add a new party, it is a new cause of action.

Despite the Nams' knowledge of John Doe's identity, they chose not to amend their Statement to substitute James for John Doe before electing to waive arbitration. In addition, the Nams did not serve James with any of the documents in the HCAO proceeding. By filing the Second Amended Statement mentioning only John Doe and James, and no other defendant, the Nams did not correct a misnomer, but added a new

party and pursued a new cause of action after the statute of limitations had run. James had no obligation to enter an appearance in the previous proceedings, because she had not been named as a party in place of John Doe, nor was she served by the Nams.

A New Party May Not Be Added After the Statute of Limitations Has Run.

The Court of Appeals has reconciled the liberal amendment of pleadings and the goal of statutes of limitations by requiring an amendment that adds a new defendant to be filed within the statute of limitations period. *Crowe v. Houseworth*, 272 Md. 481, 486, 325 A.2d 592, 595-596 (1974) (citing *Talbott v. Gegenheimer*, 237 Md. 62, 205 A.2d 285 (1964)). In *Crowe*, the Court discussed the doctrine of relation back in the context of the case before it, where a claim was added by amendment *during* the statute of limitations period. The Court explained that the doctrine more often involves an amendment of the allegations in a case than the addition or substitution of parties. Nevertheless, "the allowance or refusal of an amendment is ordinarily within the discretion of a trial court and ... no appeal will lie from the action in the absence of a clear showing of an abuse of discretion." *Crowe*, 272 Md. at 489, 325 A.2d at 597. The Court emphasized that the amendment related back because it was filed within the applicable statute of limitations.

Unlike the party in *Crowe*, the Nams did not file the Second Amended Statement before the statute of limitations had run. Rather, they attempted to replace "Health Care Provider John Doe, M.D." with James after the limitations period had expired and after having elected to waive arbitration and proceed to Circuit Court. The effect of the

amendment was to try to add a new party. The second amendment did not correct a misnomer, *i.e.*, a mistake concerning the identity of the proper party, but rather, for the first time identified the individual who had treated Ms. Nam.

In fact, the Second Amended Statement presents a similar situation to that before the Court of Appeals in *Talbott v. Gegenheimer, supra*. In that case, Talbott filed a claim for personal injuries she sustained in a car accident that occurred while she rode in a car driven by Ms. Higgins. Talbott initially sued Ms. Higgins and Mr. Gegenheimer, whom she believed to be the driver of the other car. After the statute of limitations expired, Talbott amended the complaint to substitute Ms. Gegenheimer, the wife of Mr. Gegenheimer, as the "actual" driver of the other car. The Court held that "[t]his was not the case of *a mere misnomer* . . . ." *Id*. at 63, 205 A.2d at 286 (emphasis added). Instead, Ms. Gegenheimer was a new party, and the claim against her was barred by the statute of limitations. *Id*.

A new party can be added only during the statute of limitations period, yet the Nams failed to do so in this case. The alleged negligent acts or omissions occurred on December 23, 1991, and the Nams obtained medical records by March 1992, which was only a few months later. (E. 275) A reasonably diligent investigation would have revealed that James was John Doe before the statute of limitations ran.[6] The Nams,

[6]Although the Nams claim that they could not decipher James' signature on the entry for December 23, 1991, they could have inquired sooner than they did—they received the medical reports on or about March 9, 1992, and did not make any inquiries until 1995 when they served interrogatories and received answers to them and deposed

however, did not file the amendment seeking to include James until approximately April 10, 1996—this was well past the three-year statute of limitations. Md. Code Ann., Cts. & Jud. Proc. § 5-101. As such, both the Panel Chair and the Circuit Court correctly found that the claim against James was time barred.

There Has Been No Demonstration of an Intent to Include James as a Party, Which Might Allow the Amendment to Relate Back.

The Nams contend that they always intended to file a claim against James and that James was on notice of the Nams' claim. They further argue that the County was aware of James' role in the matter and had constructive notice of the claim well within the statute of limitations period. The Nams primarily rely on fictitious-name pleading to make James a defendant to this case. Alternatively, they seek to impute notice to James by virtue of the County's knowledge and participation in the case. As discussed in this section, however, the Nams did not demonstrate an intent to file a claim against James, nor did any purported notice to James's employer suffice as notice or service upon her within the statute of limitations period.

The Maryland Rules specifically require that "[e]very action shall be prosecuted in the name of the real party in interest ...." Md. Rule 2-201. The language of the Rule suggests that the use of a fictitious name would not suffice to state a claim. In fact, when this Court considered a party's use of a fictitious name several years ago, the Court

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James. (E. 275, 203-204)

referred to Rule 2-201 as well as cases decided by other jurisdictions to make its decision. The issue presented to the Court involved whether a plaintiff could use a fictitious name to protect his privacy. This Court held that the plaintiff's privacy interest justified using a fictitious name in that case, because the essence of his claim derived from an intrusion on his privacy by revealing confidential medical information. *Doe v. Shady Grove Adventist Hospital*, 89 Md. App. 351, 363-364, 598 A.2d 507, 513 (1991). The identity of the plaintiff was not in question, but only whether he could use a pseudonym in court instead of his own name. Maryland has not recognized fictitious-name pleading in any other situation.

In the present case, the issue does not involve a party wishing to protect his own privacy. Instead, the Nams filed their First Amended Statement to add John Doe, M.D., because they knew an individual health-care provider had examined Ms. Nam, but they did not know the identity of that person. The logical expectation would be that, once the Nams discovered John Doe's identity, they would amend the Statement and serve the individual—they never did so. This case presents a completely different situation from that in *Doe, supra*, where the defendants knew the plaintiff's identity and, having initiated the action, he was an actual party to the case.

Several other jurisdictions have addressed the problem created by fictitious-name pleading. A California appellate court aptly explained the conflict between permitting a

plaintiff to sue a defendant using a fictitious name in the manner sought by the Nams and maintaining the integrity of a statute of limitations:

> We are not, of course, unmindful of the settled rule that a bona fide attempt to state a cause of action against a party, which fails by reason of some imperfections, may be remedied by amendment so that the amended pleading will relate back to the date of the filing of the original defective pleading and avoid the running of the statute of limitations in the interim [citations omitted], but we have yet to read of a case where the running of the statute has been held to be avoided by filing a complaint wherein a defendant is designated by a *fictitious name* and the only allegations as to him are that the plaintiff is ignorant of the defendant's true name and, when he knows it, will amend by substituting it, and at that future time make some charge against such defendant. Yet that seems to us precisely what appellants, as to these four defendants, have attempted here. If procedure of that description can be tolerated, all statutes of limitation might as well be at once and forever repealed. [emphasis added]

Gates v. Wendling Nathan Co., 27 Cal. App. 2d 307, 315, 81 P.2d 173, 177 (1938), *overruled on other grounds*, *Cross v. Pacific Gas & Elec. Co.*, 36 Cal. Rptr. 321, 388 P.2d 353 (1964). Similarly, in *Rumberg v. Weber Aircraft Corp.*, 424 F. Supp. 294 (C.D. Cal. 1976), the court noted that, although the California Code permitted fictitious-name pleading, it also required that:

> When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly . . . .

Id. at 296 n.1. As with *Gates*, the key to using a fictitious name is the total lack of knowledge as to the defendant's identity.

At least two other jurisdictions have viewed attempts to substitute a named individual for a John Doe after the limitations period has expired with skepticism and have barred them. For example, in *Bruce v. Smith*, 581 F. Supp. 902 (W.D. Va. 1984), the court wrote that "[n]aming of unknown, fictitious, or 'John Doe' defendants in a complaint does not toll the statute of limitations until such time as the names of these parties can be secured." *Id*. at 905. Similarly, in *Varlack v. SWC Caribbean Inc.*, 550 F.2d 171 (3d Cir. 1977), the court concluded that the act of replacing a "John Doe" defendant with a party's real name introduced a new party or litigant. *Id.* at 174.

Consistent with the drawbacks recognized by other jurisdictions, the Maryland Rules require all actions to be prosecuted "in the name of the real party in interest" and makes no mention of any less rigid rule for identifying defendants. Md. Rule 2-201. Inasmuch as "John Doe" is not a real party in interest, fictitious-name pleading does not comply with the Rule. Even if it were permitted, the Nams knew the identity of the John Doe when the County provided answers to interrogatories and when James confirmed it during her deposition in August 1995—before the waiver of arbitration. Despite the Nams' knowledge, they did not amend the Statement at the HCAO, but chose to waive arbitration and proceed to Circuit Court. Once they did so, they dismissed John Doe from their Circuit Court pleading. At this juncture, there remained nothing to amend at the

HCAO and no allegations to relate back to. *See Priddy v. Jones*, 81 Md. App. 164, 170-171, 567 A.2d 154, 157 (1989), *cert. denied*, 319 Md. 72, 570 A.2d 864 (1990) (amended complaint filed after judgment was rendered on original complaint was barred by the statute of limitations; there was nothing pending to which the amendment could relate back). The claim against James, therefore, was filed after the statute of limitations ran, and the HCAO and the Circuit Court properly dismissed it.

The Nams alternatively claim that the Second Amended Statement related back to their original filing because the County knew that James was John Doe. The Nams contend that this knowledge somehow can be substituted for actual notice and service to James herself to make her a party. This contention equally is without merit.

The essence of the agency relationship involves the authority of the agent to act for the principal. *Hill v. State*, 86 Md. App. 30, 35, 585 A.2d 252, 255 (1991) (citations omitted). While notice to an agent, servant or employee often may be imputed to the master or employer, there is no authority for the converse principle that notice to the master or employer somehow constitutes notice to the agent, servant or employee.

In fact, the Nams' argument ignores the fact that personal service must be made on the individual employee, regardless of whether the County has been served and entered an appearance. The Rules reflect this requirement by providing that "[a] party shall file an answer to an original complaint, counterclaim, cross-claim, or third-party claim within 30 days after being served...." Md. Rule 2-321. No provision suggests that the

knowledge of one's employer or future attorney constitutes service triggering the requirement to file an answer. The Rules delineate the specific means by which a person may effect service on a party. Md. Rules 2-121 and 2-124. Even the defendant's actual knowledge of a claim or suit against him will not cure a lack of proper service. *Miles v. Hamilton*, 269 Md. 708, 713, 309 A.2d 631, 634 (1973).

The Nams do not contend that they performed any of the actions provided by these principles, but simply claim that the County and James "knew" that the Nams intended to include James in the case. The Nams' failure to attempt to serve James with the complaint refutes an inference that they intended to include James in the case. Having learned the identity of James *prior* to electing to waive arbitration, the Nams had to amend the Statement before proceeding to Circuit Court in order to protect their claim against James. They did not do so, and the HCAO had no pending claim to be amended thereafter.

The Nams had sufficient time in which to conduct a diligent investigation to identify James. Once they learned of her involvement in the treatment of Ms. Nam, it was incumbent upon them to amend their claim at the HCAO to include James personally before they waived arbitration. The failure to do so, combined with the joint election to waive arbitration submitted by all parties of record, precluded the subsequent amendment of the Statement before the HCAO. The statute of limitations had run and no basis for

relation back existed. This Court, therefore, should affirm the dismissal of the amendment and the claims against James.

The Nams Demonstrated an Intent to Exclude James

Not only did the Nams fail to demonstrate an intent to include James in their claim, but at two key stages, the Nams showed an intent to exclude James from the case. The first indication of an intent to exclude James occurred when James continually was excluded from the pleadings and, ultimately, was dismissed with prejudice from the complaint in Circuit Court. The potential liability of the County stems solely from the alleged negligence of its employee, James.[7] The various Statements and Complaints never alleged that the County itself was negligent, but alleged liability solely based on the doctrine of *respondeat superior*. This meant that, if the employee was not negligent, the County would not be liable.

Although the Nams filed a First Amended Statement, in which they named John Doe, M.D., as a defendant health-care provider and included allegations that John Doe, M.D., was the County employee who was negligent, they did not serve any individual as John Doe, M.D. Thereafter, while their claim remained pending in the HCAO, the Nams conducted discovery and learned the identity of the County employees who had examined and treated Ms. Nam during the time period relevant to their claims. Upon deposing

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[7]This legal liability remains distinct from any financial responsibility the County has if an employee is found negligent and a judgment is entered. *See* discussion of LGTCA, *supra*.

James, they discovered that she was the John Doe, M.D., whom they alleged was negligent.

Despite learning these facts, the Nams did not file a Second Amended Statement then, but instead, elected to proceed against Montgomery County only, pursuing their claim under the doctrine of *respondeat superior*. Following this choice, all of the parties in the case consented to waive arbitration—the Nams, the County, the Hospital, and EMA. This act reflected an intent to abandon the claims against John Doe, M.D.

The second key stage at which the Nams demonstrated their intent not to pursue a claim against James was when they reached the Circuit Court after they waived arbitration. The Nams filed a complaint in the Circuit Court and included John Doe, M.D., in the caption, as well as the other defendants, but included no specific allegations against John Doe, M.D. (E. 9-22) This occurred well after the Nams learned that James was John Doe. By removing all references to and counts against John Doe from the Complaint, the Nams abandoned and withdrew their claims against James, individually. *See Priddy v. Jones*, *supra*. When the Nams subsequently dismissed John Doe, M.D., with prejudice, there could be no doubt of their intent not to pursue a claim against James. individually (E. 29) In fact, even if the transfer to Circuit Court were ineffective, the Line would have become a filing in the HCAO claim—John Doe still would have been dismissed from the case.

For these reasons, the Nams have not established that James had notice of her intended status as a defendant during the limitations period. In these circumstances, relation back does not apply to relieve the Nams of the statute of limitations bar to their claims against James in the Second Amended Statement. The Circuit Court correctly dismissed all claims regarding James, and this Court should affirm that decision.

CONCLUSION

Claims for medical malpractice must comply with specific procedural requirements. The availability of an arbitration process for these claims does not absolve a party of complying with service requirements and of filing their claims against all parties within the statute of limitations period. The Nams knew the identity of the John Doe in this case before they elected to waive arbitration in the HCAO, but they did not name James as a party until after the case was transferred to Circuit Court and after the statute of limitations expired. In addition, the County remained immune from liability for the exercise of its governmental function in providing health care services. The Circuit Court, therefore, properly dismissed the complaints and this Court should affirm that decision.

Respectfully submitted,

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Statement pursuant to Maryland Rule 8-504(a)(8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13pt type size.

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APPENDIX

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Letter to Harry Chase dated April 10, 1996 (Exhibit J to the County's Motion to Dismiss and/or for Summary Judgment) . . . . . Apx. 14

This Appendix has been included to provide the statutes cited in the Appellees' brief as well as exhibits that were omitted from the record extract.

Excerpts of Maryland Constitution, Art. XI-A

Section 1. Charter boards; preparation and adoption of charter.

On demand of the Mayor of Baltimore and City Council of the City of Baltimore, or on petition bearing the signatures of not less than 20% of the registered voters of said City or any County (Provided, however, that in any case 10,000 signatures shall be sufficient to complete a petition), the Board of Election Supervisors of said City or County shall provide at the next general or congressional election, occurring after such demand or the filing of such petition, for the election of a charter board of eleven registered voters of said City or five registered voters in any such Counties. Nominations for members for said charter board may be made not less than forty days prior to said election by the Mayor of Baltimore and City Council of the City of Baltimore or the County Commissioners of such County, or not less than twenty days prior to said election by petition bearing the signatures written in their own handwriting (and not by their mark) of not less than 5% of the registered voters of the said City of Baltimore or said County; provided, that in any case Two thousand signatures of registered voters shall be sufficient to complete any such nominating petition, and if not more than eleven registered voters of the City of Baltimore or not more than five registered voters in any such County are so nominated their names shall not be printed on the ballot, but said eleven registered voters in the City of Baltimore or five in such County shall constitute said charter board from and after the date of said election. At said election the ballot shall contain the names of said nominees in alphabetical order without any indication of the source of their nomination, and shall also be so arranged as to permit the voter to vote for or against the creation of said charter board, but the vote cast against said creation shall not be held to bar the voter from expressing his choice among the nominees for said board, and if the majority of the votes cast for and against the creation of said charter board shall be against said creation the election of the members of said charter board shall be void; but if such majority shall be in favor of the creation of said charter board, then and in that event the eleven nominees of the City of Baltimore or five nominees in the County receiving the largest number of votes shall constitute the charter board, and said charter board, or a majority thereof, shall prepare within 18 months from the date of said election a charter or form of government for said city or such county and present the same to the Mayor of Baltimore or President of the Board of County Commissioners of such county, who shall publish the same in at least two newspapers of general circulation published in the City of Baltimore or County within thirty days after it shall be reported to him. Such charter shall be submitted to the voters of said City or County at the next general or Congressional election after the report of said charter to said Mayor of Baltimore or President of the Board of County Commissioners; and if a majority of the votes cast for and against the adoption of said charter shall be in favor of such adoption, the said charter

from and after the thirtieth day from the date of such election shall become the law of said City or County, subject only to the Constitution and Public General Laws of this State, and any public local laws inconsistent with the provisions of said charter and any former charter of the City of Baltimore or County shall be thereby repealed.

* * *

Section 2. General Assembly to provide grant of express powers; extension, modification, etc., of such powers.

The General Assembly shall by public general law provide a grant of express powers for such County or Counties as may thereafter form a charter under the provisions of this Article. Such express powers granted to the Counties and the powers heretofore granted to the City of Baltimore, as set forth in Article 4, Section 6, Public Local Laws of Maryland, shall not be enlarged or extended by any charter formed under the provisions of this Article, but such powers may be extended, modified, amended or repealed by the General Assembly.

Excerpts of Maryland Annotated Code:

Art. 25A, §5

* * *

(C) County Institutions

To erect, establish, maintain and control hospitals, almshouses, pesthouses or other similar institutions within the county, and make all regulations for the government and conduct of the same; to erect, establish and maintain courthouses; to establish, maintain, regulate and control county jails, and county houses of correction or detention and reformatories, and to regulate all persons confined therein; to make proper provision for female and juvenile offenders.

* * *

(J) Health and Nuisances

To prevent, abate and remove nuisances; to prevent the introduction of contagious diseases into such county; and to regulate the places of manufacturing soap and candles and fertilizers, slaughterhouses, packinghouses, canneries, factories, workshops, mines,

manufacturing plants and any and all places where offensive trades may be carried on, or which may involve or give rise to unsanitary conditions or conditions detrimental to health.

Nothing in this article or section contained shall be construed to affect in any manner any of the powers and duties of either the Secretary of Health and Mental Hygiene or the Secretary of the Environment or any public general laws of the State relating to the subject of health.

* * *

(S) Amendment of County Charter

To pass any ordinance facilitating the amendment of the county charter by vote of the electors of the county and agreeable to Article XI-A of the Constitution.

The foregoing or other enumeration of powers in this article shall not be held to limit the power of the county council, in addition thereto, to pass all ordinances, resolutions or bylaws, not inconsistent with the provisions of this article or the laws of the State, as may be proper in executing and enforcing any of the powers enumerated in this section or elsewhere in this article, as well as such ordinances as may be deemed expedient in maintaining the peace, good government, health and welfare of the county.

Provided, that the powers herein granted shall only be exercised to the extent that the same are not provided for by public general law; provided, however, that no power to legislate shall be given with reference to licensing, regulating, prohibiting or submitting to local option, the manufacture or sale of malt or spirituous liquors.

* * *

(Y) County Board of Health

To organize and establish a county board of health to act instead of the county council as the county board of health under Title 3, Subtitle 2 of the Health-General Article.
Health-General Article

* * *

Art. 48A, § 480

Each policy issued to cover the liability of any charitable institution for negligence or any other tort shall contain a provision to the effect that the insurer shall be estopped from asserting, as a defense to any claim covered by said policy, that such institution is immune from liability on the ground that it is a charitable institution.

Cts. & Jud. Proc. § 3-2A-02. **Exclusiveness of procedures.**

(a) Claims and actions to which subtitle applicable.
   (1) All claims, suits, and actions, including cross claims, third-party claims, and actions under Subtitle 9 of this title, by a person against a health care provider for medical injury allegedly suffered by the person in which damages of more than the limit of the concurrent jurisdiction of the District Court are sought are subject to and shall be governed by the provisions of this subtitle.
   (2) An action or suit of that type may not be brought or pursued in any court of this State except in accordance with this subtitle.
   (3) Except for the procedures stated in § 3-2A-06 (f) of this subtitle, an action within the concurrent jurisdiction of the District Court is not subject to the provisions of this subtitle.

(b) Statement of amount of damages. A claim filed under this subtitle and an initial pleading filed in any subsequent action may not contain a statement of the amount of damages sought other than that they are more than a required jurisdictional amount.

(c) Establishing liability of health care provider. In any action for damages filed under this subtitle, the health care provider is not liable for the payment of damages unless it is established that the care given by the health care provider is not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

(d) Maryland Rules applicable. Except as otherwise provided, the Maryland Rules shall apply to all practice and procedure issues arising under this subtitle.

* * *

Cts. & Jud. Proc. § 3-2A-06A. Waiver of Arbitration.

(a) In general. — At any time before the hearing of a claim with the Health Claims Arbitration Office, the parties may agree mutually to waive arbitration of claim, and the provisions of this subsection then shall govern all further proceedings on the claim.

(b) Written Election. — (1) The claimant shall file with the Director, a written election to waive arbitration which must be signed by all parties or their attorney of record in the arbitration proceeding. (2) After filing, the written election shall be mutually binding upon all parties.

Cts. & Jud. Proc. § 5-101. Three-year limitation in general.

A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.

Cts. & Jud. Proc. § 5-304. Actions for unliquidated damages.

(a) Notice required. Except as provided in subsection (c) of this section, an action for unliquidated damages may not be brought against a local government or its employees unless the notice of the claim required by this section is given within 180 days after the injury.

(b) Manner of giving notice.

(1) Except in Anne Arundel County, Baltimore County, Harford County, and Prince George's County, the notice shall be given in person or by certified mail, return receipt requested, bearing a postmark from the United States Postal Service, by the claimant or the representative of the claimant, to the county commissioner, county council, or corporate authorities of a defendant local government, or:

(i) In Baltimore City, to the City Solicitor;

(ii) In Howard County, to the County Executive;

(iii) In Montgomery County, to the County Executive.

(2) In Anne Arundel County, Baltimore County, Harford County, and Prince George's County, the notice shall be given in person or by certified mail, return receipt requested, bearing a postmark from the United States Postal Service, by the claimant or the representative of the claimant, to the county solicitor or county attorney.

(3) The notice shall be in writing and shall state the time, place, and cause of the injury.

(c) Waiver of notice requirement.- Notwithstanding the other provisions of this section, unless the defendant can affirmatively show that its defense has been prejudiced by lack of required notice, upon motion and for good cause shown the court may entertain the suit even though the required notice was not given.

Excerpts of Maryland Rules:

Rule 2-121. Process - Service - In personam.

(a) Generally. Service of process may be made within this State or outside this State when authorized by the law of this State, by delivering to the person to be served a copy of the summons, complaint, and all other papers filed with it, or by mailing to the person to be served a copy of the summons, complaint, and all other papers filed with it by certified mail requesting: "Restricted Delivery - show to whom, date, address of delivery." Service by certified mail under this Rule is complete upon delivery. Service outside the State may also be made in the manner prescribed by the court or prescribed by the foreign jurisdiction if reasonably calculated to give actual notice.

(b) Evasion of service. When proof is made by affidavit that a defendant has acted to evade service, the court may order that service be made by mailing a copy of the summons, complaint, and all other papers filed with it to the defendant at the defendant's last known residence and delivering a copy of each to a person of suitable age and discretion at the place of business, dwelling house, or usual place of abode of the defendant.

(c) By order of court. When proof is made by affidavit that good faith efforts to serve the defendant pursuant to section (a) of this Rule have not succeeded and that service pursuant to section (b) of this Rule is inapplicable or impracticable, the court may order any other means of service that it deems appropriate in the circumstances and reasonably calculated to give actual notice.

(d) Methods not exclusive. The methods of service provided in this Rule are in addition to and not exclusive of any other means of service that may be provided by statute or rule for obtaining jurisdiction over a defendant.

Rule 2-124. Process - Persons to be served.

(a) Individual. Service is made upon an individual by serving the individual or an agent authorized by appointment or by law to receive service of process for the individual.

(b) Individual under disability. Service is made upon an individual under disability by serving the individual and, in addition, by serving the parent, guardian, or other person having care or custody of the person or estate of the individual under disability.

(c) Corporation. Service is made upon a corporation, incorporated association, or joint stock company by serving its resident agent, president, secretary, or treasurer. If the corporation, incorporated association, or joint stock company has no resident agent or if a good faith attempt to serve the resident agent, president, secretary, or treasurer has failed, service may be made by serving the manager, any director, vice president, assistant secretary, assistant treasurer, or other person expressly or impliedly authorized to receive service of process.

(d) General partnership. Service made upon a general partnership sued in its group name in an action pursuant to Code, Courts Article, § 6-406 by serving any general partner.

(e) Limited partnership. Service is made upon a limited partnership by serving its resident agent. If the limited partnership has no resident agent or if a good faith attempt to serve the resident agent has failed, service may be made upon any general partner or other person expressly or impliedly authorized to receive service of process.

(f) Limited liability partnership. Service is made upon a limited liability partnership by serving its resident agent. If the limited liability partnership has no resident agent or if a good faith attempt to serve the resident agent has failed, service may be made upon any other person expressly or impliedly authorized to receive service of process.

(g) Limited liability company. Service is made upon a limited liability company by serving its resident agent. If the limited liability company has no resident agent or if a good faith attempt to serve the resident agent has failed, service may be made upon any member or other person expressly or impliedly authorized to receive service of process.

(h) Unincorporated association. Service is made upon an unincorporated association sued in its group name pursuant to Code, Courts Article, § 6-406 by serving any officer or member of its governing board. If there are no officers or if the association has no governing board, service may be made upon any member of the association.

(i) State of Maryland. Service is made upon the State of Maryland by serving the Attorney General or an individual designated by the Attorney General in a writing filed with the Chief Clerk of the court and by serving the Secretary of State. In any action attacking the validity of an order of an officer or agency of this State not made a party, the officer or agency shall also be served.

(j) Officer or agency of the State of Maryland. Service is made upon an officer or agency of the State of Maryland, including a government corporation, by serving the officer or agency.

Rule 2-201. Real party in interest.

Every action shall be prosecuted in the name of the real party in interest, except that an executor, administrator, personal representative, guardian, bailee, trustee of an express trust, person with whom or in whose name a contract has been made for the benefit of another, receiver, trustee of a bankrupt, assignee for the benefit of creditors, or a person authorized by statute or rule may bring an action without joining the persons for whom the action is brought. When a statute so provides, an action for the use or benefit of another shall be brought in the name of the State of Maryland. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for joinder or substitution of the real party in interest. The joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Rule 2-321. Time for filing answer.

(a) General rule. A party shall file an answer to an original complaint, counterclaim, cross-claim, or third-party claim within 30 days after being served, except as provided by sections (b) and (c) of this Rule.

(b) Exceptions.

(1) A defendant who is served with an original pleading outside of the State but within the United States shall file an answer within 60 days after being served.

(2) A defendant who is served with an original pleading by publication or posting, pursuant to Rule 2-122, shall file an answer within the time specified in the notice.

(3) A person required by statute of this State to have a resident agent that is served with an original pleading by service upon the State Department of Assessments and Taxation, the Insurance Commissioner, or some other agency of the State authorized by statute to receive process shall file an answer within 60 days after being served.

(4) The United States or an officer or agency of the United States served with an original pleading pursuant to Rule 2-124 (f) shall file an answer within 60 days after being served.

(5) A defendant who is served with an original pleading outside of the United States shall file an answer within 90 days after being served.

(6) If rules for special proceedings, or statutes of this State or of the United States, provide for a different time to answer, the answer shall be filed as provided by those rules or statutes.

(c) Automatic extension. When a motion is filed pursuant to Rule 2-322, the time for filing an answer is extended without special order to 15 days after entry of the court's order on the motion or, if the court grants a motion for a more definite statement, to 15 days after the service of the more definite statement.

Rule 2-341. Amendment of pleadings.

* * *

(c) Scope. An amendment may seek to (1) change the nature of the action or defense, (2) set forth a better statement of facts concerning any matter already raised in a pleading, (3) set forth transactions or events that have occurred since the filing of the pleading sought to be amended, (4) correct misnomer of a party, (5) correct misjoinder or nonjoinder of a party so long as one of the original plaintiffs and one of the original defendants remain as parties to the action, (6) add a party or parties, (7) make any other appropriate change. Amendments shall be freely allowed when justice so permits. Errors or defects in a pleading not corrected by an amendment shall be disregarded unless they affect the substantial rights of the parties.

* * *

Excerpts of Montgomery County Code 1994, as amended:

Sec. 1A-201. Establishing departments and principal offices.

(a) *Executive Branch.*

(1) These are the departments and principal offices of the Executive Branch.

County Executive [Charter, § 201 et seq.]

Chief Administrative Officer [Charter, § 210 et seq.]

Correction and Rehabilitation [Section 2-28]

County Attorney [Charter § 213]

Economic Development [Section 2-64L]

Environmental Protection [Section 2-29]

Finance [Charter § 214; Section 20-38 et seq.]

Fire and Rescue Services [Section 2-39A]

Health and Human Services [Section 2-42A]

Housing and Community Affairs [Section 2-27 et seq.]

Human Resources [Section 2-64I; ch. 33]

Information Systems and Telecommunications [Section 2-58D]

Intergovernmental Relations [Section 2-64J]

Liquor Control

Management and Budget [Section 2-64K]

Permitting Services [Section 2-24B]

Police [Section 2-43; ch. 35]

Procurement [Section 2-64N]

Public Information

Public Libraries [Section 2-45 et seq.]

Public Works and Transportation [section 2-55 et seq.]

Recreation [Section 2-58]

(2) The County Executive determines whether an entity is a department or a principal office.

a. Entities that directly serve the public are departments.

b. Entities that provide internal support to other parts of County government are principal offices.

(b) *Legislative Branch.* There are no departments or principal offices in the Legislative Branch.

DIVISION 7A. DEPARTMENT OF HEALTH AND HUMAN SERVICES.

Sec. 2-42A. Functions, powers and duties.

(a) *Generally.* The Department is responsible for providing a single integrated system for the provision of health and human services with other public and private agencies that provide health and human services in the County. Department services are supportive services that provide the basic necessities, such as food, clothing, and shelter to people, and those services that directly serve and protect the health, mental health, economic well-being, and social functioning of individuals and families. The Department administers programs and provides services in the areas of:

(1) individual and community health services;

(2) public health services; and

(3) human services to clients.

(b) *Direct service divisions; non-merit positions.* The Department has 5 direct service divisions and an accountability and customer services division. The position of head of each of these divisions is a non-merit position.

(c) *Powers of the Department.* The Department may:

(1) administer contracts for services;

(2) plan, develop and administer programs;

(3) advise the Council and the County Executive;

(4) collect data on the need for services and the effectiveness of programs;

(5) collect fees;

(6) enforce regulations;

(7) engage in programs in cooperation with agencies of the State, the County, other political subdivisions and with private groups;

(8) enter into agreements in order to carry out its duties.

(9) provide information;

(10) maintain vital and case records;

(11) provide consultation;

(12) provide services;

(13) provide training;

(14) operate laboratories;

(15) conduct studies and investigations; and

(16) carry out any other functions that are necessary to achieve the purposes of this Section.

(d) *Duties of the Department.*

(1) The Department provides comprehensive health and human services planning and program evaluation.

(2) The Department must carry out functions as authorized and directed by:

(A) the County Executive,

(B) the County Board of Health; and

(C) State and County laws and regulations.

(3) The Department provides staff support to the:

(A) Commission on Children and Youth;

(B) Commission on Aging;

(C) Community Action Committee;

(D) Commission on Child Care;

(E) Commission on People with Disabilities;

(F) Alcohol and Other Drug Abuse Advisory Council.

(G) Mental Health Advisory Council.

(H) Juvenile Court Committee;

(I) Commission on Health;

(J) Board of Social Services;

(K) Adult Public Guardianship Review Board; and

(L) Victim Services Advisory Board.

(e) *Fees of services.*

(1) The County Executive may set fees by regulation under method (3) for use of a service that the Department provides.

(2) The fee must not exceed the cost of the service provided.

(3) The Director may waive a fee if:

(A) the Director decides the waiver would promote the purposes of this Section; and

(B) the client cannot afford to pay the fee.